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ABSTRACT

The major policy issues raised by Federal Communications Commission (FCC) regulations with regard to the year-round nature of political media campaigns and the emergence of political action committees (PACs) are explored in this paper. The first part of the paper introduces the major policy issues, specifically who should have an affirmative right of access to the airwaves, how the government can assure fair treatment of all politicians and parties by broadcasters, and how far the government can go to even out the financial resources used to buy air time. The second part of the paper discusses the equal opportunities section of the Communications Act; the "Cullman" policy, which deals with general fairness issues and not specifically with political campaigning; and the "Zapple" policy, an FCC ruling to the effect that it would not be reasonable for a licensee to refuse to sell time to a candidate comparable to that sold to another candidate. The third part of the paper discusses ineffective legislation and a Supreme Court ruling concerning limitations on campaign financing contributions from PACs, and whether the FCC is required to consider PACs as representatives of candidates in light of the PACs' occasional "search and destroy" conduct. The fourth part of the paper focuses on some recent political access cases as predictors of future policy, precedents determining who has access rights during political campaigns, whether the "Zapple" or"Cullman" policies are applicable to PACs asking for response time, and licensees' obligations and liabilities during noncampaign periods. The fifth part considers whether the PACs should be treated as a special case or if those regulations binding them during campaign periods should also do so during noncampaign periods. The paper concludes that the use of "Cullman" obligations would work affirmatively to redress imbalances in media access posed by PACs. (HTH)

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BROADCAST ACCESS AND REPLY RIGHTS FOR POLITICIANS AND PACS: A CONTINUING HEADACHE FOR THE FCC

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I. Introduction

Those who think the Communications Act's Sec. 315 equal opportunities provisions have provided permanent stability for political campaign regulation of broadcasters would be amazed at the byzantine issues raised in the last two decades. The year-round nature of campaigning with a lead role assigned to television and radio, the emergence of political action committees (PACs) as the wild card of modern politics, and subtle distinctions in various FCC doctrines have led to repeated complaints and litigation. Small wonder, then, that the current FCC majority favors repeal of both Sec. 315 and the Fairness Doctrine. Among the major policy issues raised are these:

A. Who should have an affirmative right of access to the airwaves? Only candidates under certain circumstances? Or should we include political parties in noncampaign periods, or political action committees trying to get an early start at unseating an incumbent?

B. How can government assure fair treatment of all politicians and parties by broadcasters, while at the same time keeping the latter from becoming enmeshed in the political process? In certain fairness situations, free time must be provided to respond to a paid discussion of an issue, but in politics wouldn't this force a broadcaster to in effect subsidize one side?

C. How far can government go to assure not only fair treatment for political parties and candidates, but also to correct for unequal financial resources of partisans with which to buy time on the air? The Supreme Court has had some strong comments about the Federal Election Campaign Act and the Presidential Election Campaign Fund Act on this matter, as recently as March 1985.

It was, in fact, the high court's voiding of the FECA's $1,000 limit on independent expenditures by individuals and groups (read "political action committees" or "PACs" today) relative to a candidate that set the stage for the most recent major test case in the political broadcast regulation area. The National Conservative Political Action Committee sought in 1981 to place negative spot announcements on a number of stations around the country attacking targeted liberal Democrats up for re-election. But some of the latter saw the move coming, and took action. Counsel for Sen. Daniel Patrick Moynihan (D-N.Y.), for example, sent letters to broadcasters reminding them that such spots could bring both liability for defamation suits and demands for free time to respond (the Cullman doctrine, to be discussed shortly)[1] Result: many stations refused to run the spots, NCPAC filed and lost on its request for mandatory access. This prompted a broadcast industry group, headed by CBS, to file a petition for a declaratory ruling by the FCC that free response time obligations would not apply to time bought by a political party or independent group, whether it be during or outside a campaign period, a strong distinction for the FCC. The commission rejected the petition, but the case raises numerous critical policy issues that need backgrounding before we discuss it.

II. Equal opportunities, Cullman and Zapple

Sec. 315 of the Communications Act, the so-called equal opportunities section, reflects a concern dating from the start of broadcasting that licensees might systematically favor one political candidate over another in granting access. Therefore, if a station sells or gives time to one candidate during a campaign, it must offer

equivalent time on the same basis to all opponents. And since the equal access is mandatory and the station cannot censor these political messages, it has been held that the station has in these instances immunity from libel actions.[2] Broadcasters originally did not have to provide time for any candidates under 315, but a 1972 law change, Sec. 312(a)(7), threatened possible license revocation for willful or repeated failure to allow "reasonable access to or to permit purchase of reasonable amounts of time" by a candidate for federal elective office.

Broadcasters never liked Sec. 315 but at least they knew their obligations under it. Or so it seemed until 1959 and thereafter. For in that year the FCC's evolving Fairness Doctrine, requiring licensees to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance," was incorporated into a revised Sec. 315(a).[3] Since that time, persons and groups in the political arena who were clearly ineligible for equal opportunities have contrived arguments which would give them access to broadcasting through the side door of the Fairness Doctrine and the several corollaries to it (most notably Cullman and Zapple) that have been created by the FCC to mesh its operation with that of the narrow, candidate-centered thrust of the original 315. An important difference between equal opportunities and the Fairness Doctrine: Congress revised the former to exempt four categories of news and public affairs programming from response obligations, whereas the Fairness Doctrine looks at the licensee's total programming on an issue, including news and public affairs. (Both laymen and media leaders who

should know better persist in confusing fairness and equal opportunities. Example: a 1982 New York Times story on a speech by its publisher, Arthur Ochs Sulzberger, at Columbia University had him calling for "an end to the 'fairness doctrine' under which television and radio broadcasters are required to give equal time to the various participants in a political campaign."[4] The obvious confusion of 315 and the Fairness Doctrine, which has never required precisely equal time, is matched by the vagueness of "participants.")

Cullman was a mere two-page FCC letter of 1963, and dealt with general fairness issues, not with political campaigning, our immediate focus. Two Alabama radio stations were airing a sponsored syndicated series, "Life Line," in which a proposed nuclear weapons test ban treaty had been criticized. A national citizens committee had requested free time to respond, and the Cullman and Walker broadcasting companies wanted an opinion as to their obligations. The FCC replied that

> where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee--and thus leave the public uninformed--on the ground that he cannot obtain paid sponsorship for that presentation.[5]

In spite of numerous rulings in the years since that have largely exempted political campaigns from the application of Cullman obligations, politicians and their partisans have found Cullman irresistible in their efforts to gain access to answer their opposition. It would indeed be a delicious irony: your money-rich opponent buys

time and you get to answer him free. In just the last five years, public figures trying for such free response time have included the Carter/Mondale committee, Sen. Thomas Eagleton and the Democratic National Committee.

Broadcasters were understandably not infatuated with the Fairness Doctrine, but in Red Lion[6] lost in their attempt to have it declared a violation of their First Amendment rights. Not only did the Supreme Court note the doctrine's validation by Congress in the 1959 amendments to Sec. 315, but pronounced its own view that the doctrine was essential to the public's right to receive access to needed ideas and information. An infrequently cited passage in Red Lion relates the doctrine to the political campaign thrust of 315. The majority opinion noted that a licensee could easily circumvent the objectives of 315 by banning all campaign appearances by candidates (thus eliminating response demands) and devoting his station entirely to supporters of one side--were it not for the Fairness Doctrine and its ability to deal with overall imbalances in treatment of issues, including issues raised in campaigns.

It was thus no accident that the commission the following year, 1970, acted to plug the hole in its political campaign rules that the court had spotted. In Zapple, the FCC ruled that sale of time to spokesmen for or supporters of a candidate clearly invokes the Fairness Doctrine, and that "barring unusual circumstances, it would not be reasonable for a licensee to refuse to sell time to spokesmen for or supporters of candidate B comparable to that previously bought on behalf of candidate A."[7] The words "comparable to" being less pre-

cise than "equal" as applied to candidates, the Zapple corollary generally has been called "quasi-equal opportunities."

Since the FCC was dealing here with the Fairness Doctrine, and it was on record in Cullman that free response time might be necessary rather than leave the public uninformed on an issue, shouldn't the latter apply, too? Cullman still held in general fairness issues, the FCC said, but this was "the direct political arena." Thus, when spokesmen or supporters of candidate A have purchased time, "it is our view that it would be inappropriate to require licensees to in effect subsidize the campaign of an opposing candidate by providing candidate B's spokesmen or supporters with free time."[8] Any such requirement would be an intrusion of the Fairness Doctrine into the area of political campaign financing.

It should be noted here that, like equal opportunities for candidates, Zapple does not apply to the four news and public affairs content exemptions. Commissioner Nicholas Johnson, in a separate opinion, wondered why his brethren brought spokesmen and supporters in through the back door of the Fairness Doctrine and then excluded them from Cullman, rather than simply ruling that Sec. 315(a) includes spokesmen and supporters "as a logical expression of congressional intent" in treating candidates.[9] Hindsight would suggest that Johnson had a good point. If the commission had followed his route, and maintained a clearer demarcation between general fairness principles and equal opportunities, with all those engaged in overt politicking covered by the latter, many labored Fairness Doctrine arguments by politicians might have been forestalled. Still, the commission held to its position in a 1972 restudy of the political broadcasting

rules, pointing out that Zapple, "for all practical purposes, is confined to campaign periods. Significantly, because it does take into account the policies of Section 315, the public interest here requires both more (comparable time) and less (no applicability of Cullman) than traditional fairness."[10]

Yet to come were questions whether any or what combination of rules from 315, the Fairness Doctrine, Cullman and Zapple should apply to politicking outside campaign periods, as campaigning became a year-round, continuing activity. But first, Congress and the courts added another ingredient to the mix: the question of governmentally-imposed limits on what candidates may spend and limits on what others may contribute to or spend for (or against) them.

III. Can Government Act to Reduce Inequality in Campaign Financing?

Watergate and the irregularities in campaign financing it in part stood for led Congress in 1974 to enact a sweeping set of amendments to the Federal Election Campaign Act of 1971, provisions which set forth tight new limitations on contributions to candidates and on expenditures by and on behalf of candidates. These were ruled on by the Supreme Court in Buckley v. Valeo. The limits on contributions were upheld as a legitimate expression of the act's purpose, "to limit the actuality and appearance of corruption" resulting from large individual or group contributions.[11] But Sec. 608(e)(1)'s $1,000 ceiling on independent expenditures by individuals and groups relative to an identified candidate was another matter. The court saw little danger of real or apparent corruption here, certainly not sufficient to balance restriction of First Amendment rights, and took strong exception to the notion of imposed equality of campaign

financing:

> It is argued...that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcomes of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by Sec. 608(e)(1)'s expenditure ceiling. But the concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which wasdesigned "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[12]

Gillmor and Barron read Buckley to rule that "government-imposed equality in the opinion process is apparently not only not ordained by the First Amendment but indeed may be forbidden by it."[13] A March 1985 Supreme Court decision involving NCPAC further ruled unconstitutional the Presidential Election Campaign Fund Act's $1,000 limit on spending by political action committees on behalf of presidential candidates in general elections, on grounds similar to those stated in Buckley.[14] Thus such committees, which were minor elements in politics in the early 1970s, were able to become the free-wheeling operators in the politics of the 1980s.

For the FCC, a new question arose: Were these new PACs to be treated as equivalent of "spokesmen for or supporters of" candidates, though they often conducted negative search-and-destroy missions?

IV. Recent Political Access Cases

So far this paper has mostly asked several of the more important political access questions, and outlined the regulatory tools Congress and the FCC have developed to deal with them. Now we need to study some answers as predictors of future policy.

A. <u>Affirmative Right of Access in Political Campaigns</u>

In the political arena, who has a right to demand that a particular time period be made available to initiate discussion of an issue or candidacy? The short answer: no one. But failure to allow "reasonable access" on some basis to candidates for federal office can be cause for a license revocation, as noted earlier. Broadcasters, by statute, are not common carriers.[15] CBS v. Democratic National Committee settled this point in 1973, when the DNC had argued that broadcasters could not, as a general policy, refuse to sell time to responsible entities such as DNC for fund appeals or to comment on public issues. The Supreme Court noted that the transfer of control over the treatment of public issues from "the licensees who are accountable for broadcast performance to private individuals who are not" would mean that "the public interest would no longer be 'paramount' but, rather, subordinate to private whim."[16] The Communications Act's policy, the court felt, gives the public some assurance that the broadcaster will be answerable if he fails to meet legitimate needs, whereas the private individual's only qualifications for using the broadcast facility "may be abundant funds and a point of view."[17] (The FCC, in its earlier ruling in the DNC case, did note that if time were sold to a political party outside a campaign period, the Zapple principle should apply.)

Statute law and this high court ruling appear clear enough, but as late as 1981 the National Conservative Political Action Committee (NCPAC) was still urging the FCC to re-examine its position regarding the affirmative right of access of an independent political committee to a broadcaster's facilities. What NCPAC appeared to want was an extension of Sec. 312(a)(7)'s "reasonable access" provision

for candidates for federal office to groups wishing to comment on them, arguing that its proposed comments on past records of candidates "go to the very core of self-government."[18] The FCC held that the provision "is personal to the candidates," and noted that in You Can't Afford Dodd Committee (1980) it had specifically rejected the argument that "reasonable access inures to the benefit of independent unauthorized political committees."[19] It said a different holding would force broadcasters and the FCC into a case-by-case study of what persons and groups would be entitled to this expanded right of access, with grave First Amendment implications.

B. Responses in Political Campaigns: Zapple or Cullman?

Most FCC fairness cases occur when a demand for response time is made, and this raises a whole new set of issues. Equal opportunities for candidates need no further discussion, nor do Zapple's quasi-equal opportunities as they relate to spokesmen for or supporters of candidates during campaign periods.

But in 1980, attacks by independent political committees led both the Carter/Mondale committee and Sen. Thomas Eagleton (D-Mo.) to argue that they had not only a right to respond to such groups but to do so free under Cullman rather than under Zapple. Basic to the arguments in both cases was the view that, since the Buckley decision which retained statutory limits on their campaign finances but left independent committees free to spend as they wished, the quasi-equal opportunities of Zapple would be meaningless if candidates were to be denied free response time.

Carter/Mondale[20] dealt with what the committee termed "allegedly independent supporters" of the Reagan candidacy who were collecting

massive sums of money for political spot campaigns, some of which had an appearance by Reagan. Such appearances would trigger equal opportunities, but the critical question was whether the response should be free or paid. Before the new election laws, the petition pointed out, such independent groups had a choice of spending funds on their own or contributing them to a candidate. Now presidential candidates who accept federal funding cannot accept such private contributions, and PAC spending could (and does) throw out of balance otherwise roughly equal campaign funding.[21]

The commission noted first that Congress' primary concern was that candidates be treated equally by broadcasters. While it hoped equal opportunities would lead to an informed electorate, Congress "stopped short of guaranteeing that the public would have equal exposure to competing candidates."[22] Here the broadcaster had sold time, and thus free time should not be offered regardless of the nature of the third party or its relationship to the candidate. True, Carter/Mondale might not have funds to respond to all the independent Reagan committees, but the potential for such imbalances has always existed in political campaigns. Where one independent group buys time and there is no candidate appearance, the Zapple reasoning would apply quasi-equal opportunities just as it would for authorized spokesmen for candidates. Where the candidate did appear, then Carter/Mondale could ask for equal opportunities.

Eagleton presented the now familiar incumbent's complaint that an unfriendly PAC was waging a negative spot campaign against his voting record, in this case on KCBJ-TV, Columbia, Mo. Sen. Eagleton asked for free response time on the ground that his opponent had

reaped the benefits of an independent group's negative campaign, at no cost to himself, which had led to an "imbalanced, unequal treatment of major party candidates by a broadcaster."[23] The station said it was at most obligated and willing to extend an offer of paid time under Zapple.

The commission applied its reasoning in Carter/Mondale: that the station had sold time to opponents and had at most an obligation to offer paid time to Eagleton supporters, and that Cullman should not apply in the "political arena" for reasons often cited in the past. The Broadcast Bureau had suggested in Dodd a few weeks earlier that Zapple should not apply to independent political committees that do not purport to support or speak for a candidate, but exist merely to oppose one, but the commission declined in Eagleton and has refused since to make that distinction.[24]

C. Obligations and Liabilities in Non-Campaign Periods

Another major element in the NCPAC case originally cited in this paper was the PAC's complaint that federal candidates (such as Sen. Moynihan) had intimidated broadcasters by giving them the "mistaken impression that acceptance of NCPAC-sponsored advertisements will result in the licensee assuming burdensome obligations,"[25] including liability for libelous statements and having to afford free time in response to NCPAC announcements aired prior to the start of a campaign. As it happened, the impression was not mistaken. The commission in 1982 upheld its Broadcast Bureau's finding that, "with the exception of statements made during 'uses' by legally qualified candidates for public office, which cannot be censored, a broadcaster may be subject to defamation proceedings under the jurisdiction of

the local courts."[26] NCPAC had argued further that, since its spots were in the "political arena," Cullman obligations could not apply, whether during or outside of campaign periods. The commission restated its policy that suspension of Cullman under the Fairness Doctrine was confined to campaign periods (which, it added, cannot commence without the existence of a legally qualified candidate). Thus, NCPAC spots and even those of individuals who were not yet legally qualified candidates could in pre-campaign periods trigger Cullman. It was this aspect of the ruling that brought about the CBS et al. petition.

The commission itself has not been consistent in its treatment of the applicability of the Fairness Doctrine to political broadcasts during non-campaign periods. Back in 1970, it had extended Zapple in this way as applied to a major political party.[27] In that case, CBS had given the Democratic National Committee a half-hour to respond to issues addressed in five TV appearances by President Nixon, based on general fairness principles. The Republican National Committee asked for similar free time to respond because the DNC had raised issues not discussed by the president, and the FCC agreed. The commission extended Zapple to this non-campaign period in part because "electioneering is a continuing process."[28] Though the FCC's reasoning in this case was rejected by the D.C. Court of Appeals, the court did not determine whether, under different circumstances, an extension of Zapple might be justified.[29]

In 1982 the DNC was back before the commission on this issue, this time asking for free response time to answer a series of Republican spot announcements soliciting support for President Reagan's

economic policies. It was argued that CBS and NBC had violated the Fairness Doctrine in presenting one side of a controversial issue of public importance and not offering Cullman time for contrasting viewpoints, the spots having been aired outside a campaign period. For this last reason Zapple would not apply, the DNC felt, though the networks had offered paid response time.

The commission finessed the issue by concluding that the DNC had not made a prima facie case that there was such an imbalance in the discussion of President Reagan's program that that fairness obligations had not been met by CBS and NBC. Thus it did not need to reach either the application of Cullman or Zapple to the situation.[30]

The DNC was not through yet, and went to a fallback position on the eve of the 1982 midterm elections. President Reagan had delivered an address on the economy carried free by CBS on Oct. 13, and the DNC thought Zapple should apply to its request for similar free time. DNC's ingenious argument was that the timing of the "clearly partisan address" was calculated to support GOP congressional candidacies and thus the event "constituted an address by 'supporters' of candidates for public office."[31]

Presidential addresses have caused numerous access cases too detailed to elaborate on here. Though inherently partisan, the addresses are of such importance they are ruled to be bona fide news events and thus exempt from both equal and quasi-equal opportunities rules.[32] The FCC wisely avoids second-guessing licensees who claim this exemption. The Zapple request was denied and the DNC had no basis for a general fairness case, because CBS had taken care to air its own "Voices of Opposition" program the same evening the president spoke.

V. PACs: Should They Be Treated As a Special Case?

CBS' petition (joined by Gaylord Broadcasting, Metromedia and the National Association of Broadcasters) asked for the following FCC declaratory ruling:

> ...that when a licensee sells broadcast time to a political party or committee for political advertisements--whether during or outside a campaign period--the broadcaster has no obligation to provide free time to opposing political parties or committees, and that the Cullman principle does not apply.[33]

If we accept as settled FCC policy that Zapple and not Cullman applies to political time bought by everyone during an election campaign, then what worried the petitioners is the status of such time outside campaigns. And since the FCC has often treated political parties and independent committees under the same reasoning, there is the residual worry that since NCPAC everyone might come under Cullman outside campaign periods. At the very least, the petition was asking the FCC to reverse NCPAC.

CBS et al. argued that placing NCPAC and even not-yet-qualified candidates under Cullman outside campaign periods is contrary to the intent of Sec. 315 and that its practical effect could well be to dissuade broadcasters from selling time for political advertisements in view of the free time obligations they would assume. Why such a distinction between one period and another anyway? it was asked. "There are no clear objective criteria as to when a campaign begins," the petition argued, and added that "competition between political party committees and independent political committees for the allegiance of the American voter does not begin and end during the formal campaign period."[34]

People for the American Way (PAW), a national citizens group founded by TV producer Norman Lear to monitor infringements of First Amendment rights, in its comments on the petition took such an ominous view of the role of PACs in modern politics that it would put them under Cullman at all times, whether inside or outside campaign periods. It argues that PACs largely arrived after Zapple's formulation for supporters and spokesmen and that they are by definition "unauthorized political committees" which are "political committee(s) which (have) not been authorized in writing by a candidate to solicit or receive contributions or make expenditures on behalf of such candidates or which ha(ve) been disavowed by the candidate."[35] PAW adds:

> ...We know what to expect from spokespeople for candidates and candidate supporters or support committees. They are around before and after elections, and candidates are accountable to the electorate. Independent expenditure PACs could arrive on the air one day and disappear the next, making them unaccountable to anyone.[36]

Responding in late 1983 to the CBS et al. petition, the commission pointed out that, while politics may be a continuing process, the agency had carefully qualified the scope of the "political arena" by limiting Zapple's application to supporters of legally qualified candidates in campaign periods, matching the candidates' own rights under 315. The petition's thrust would, if made policy, destroy the distinction between campaign and noncampaign periods. There would be some sort of political issue-oriented equal opportunities doctrine that would place the broadcaster and ultimately the commission "in the role of assessing the partisan nature of an advertiser or the political or nonpolitical content of their advertisements,"

a subjective, case-by-case approach to speech both the commission and the courts have thought inappropriate if not dangerous.[37]

Finally, in justifying its denial of the petition, the commission said:

> ...the requested ruling would be subject to confusion to the extent that broadcasters may become so uncertain as to the contingent access rights triggered by sales of "political" broadcast time that they may choose to avoid such advertising entirely. In this context, we do not wish to become any more involved in broadcasters' day-to-day programming judgments.[38]

If the nagetive campaigns of PACs against targeted candidates do distort the political process, how significant a problem are they? One can look at it two ways. Federal Election Commission figures show that negative campaign spending by PACs rose from $1.4 million in 1980 to $4.5 million in 1982, with NCPAC the acknowledged giant ($3.17 million in 1982).[39] Though comparable 1984 figures are not available, Common Cause estimates contributions of PACs to Senate candidates in 1984 were up 26% over those of 1982.[40] NCPAC was widely credited with a role in the defeat of a half dozen liberal senators in 1980. But in 1982 none of the top eight targets of such campaigning lost, and there are indications that a heavy-handed negative campaign can backfire, lending sympathy and support to the local candidate under vicious fire from well-funded "outsiders."

VI. Conclusions

FCC rulings over the years reveal an often halting, uneven development of policy covering political broadcasting, but of its efforts and the doctrines it has created at least this should be said: The commissioners have in the main attempted to maintain a "traffic cop" role in these mass media where inherently not everyone

can speak whenever he wishes. They have generally remained content neutral and have tried to keep broadcasters from becoming enmeshed in the political process. Indeed, one could argue that the FCC has taken much of the pressure off of broadcasters with Zapple and Cullman, for in the absence of such doctrines stations and networks themselves would be the focus of contention by all the political wranglers. These policies collectively may not assure that everyone is treated fairly all the time, but they probably get us as close as we can expect to come to that goal.

This said, what rules should apply to political parties and PACs? The rules for candidates are pretty well covered by Congress in Sec. 315. But there is the potential for a serious imbalance in political debate, especially in the period before the formal campaign begins and PACs want to get in a pre-emptive strike against an incumbent. The FCC was, in this view, correct to apply Cullman to independent groups outside of campaign periods. But there is merit in applying Zapple in these same periods to political parties as continuing, readily identified and thus generally more accountable entities than PACs. During the campaign proper, all sides are geared to respond and can continue to take care of themselves under Zapple.

Clearly, Cullman obligations will cause many stations to turn down PAC spots before the campaign, but these groups should have no trouble placing them after the campaign begins. Broadcasters will have some added Fairness Doctrine complaints under this policy but, given the great discretion they have always had in this area, that burden seems manageable.[41] It should also be remembered that stations may satisfy fairness obligations created by PAC spots by

news coverage of issues raised and by programming in general, not just by running Cullman responses.[42]

Where the Supreme Court in Buckley and the recent NCPAC case rightly saw in independent committee expenditure limits an unconstitutional restriction of the First Amendment rights of some to enhance the relative voice of others, use of Cullman obligations as described would work affirmatively to redress imbalances. The eminent First Amendment scholar, Thomas Emerson of Yale, in explaining his defense of the Fairness Doctrine in 1978, put it well: "The object should not be so much to curb the speech of any one particular person or group or corporation as to enhance the possibilities of speech for others. In other words, bring the level up rather than cutting the top down."[43]

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FOOTNOTES

1. "NCPAC Loads Legal Guns," Broadcasting, Dec. 4, 1981, p. 61.

2. Farmers Educational and Cooperative Union v. WDAY, Inc., 360 U.S. 525 (1959).

3. Sec. 315(a) states the equal opportunities rule, the four news exemptions to it, and then acknowledges the Fairness Doctrine with this sentence: "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

4. New York Times, Nov. 18, 1982.

5. Cullman Broadcasting Co., 40 F.C.C. 576 (1963).

6. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

7. Letter to Nicholas Zapple, 23 F.C.C. 2d 707, 708 (1970).

8. Ibid.

9. Ibid, 710.

10. Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act (First Report--Handling of Political Broadcast), 36 F.C.C. 2d 40, 50 (1972).

11. Buckley v. Valeo, 424 U.S. 1, 25 (1976).

12. Ibid., 49-50.

13. Donald Gillmor and Jerome Barron, Mass Communication Law (3rd Ed.) (St. Paul: West Publishing Co., 1979), p. 688.

14. Federal Election Commission v. NCPAC, No. 83-1032, __ U.S. __ (1985).

15. The Supreme Court has upheld FCC standards that limit right of access to the period after the campaign has begun (which will be determined by the commission), and that require broadcasters to eveluate access requests individually, not via across-the-board denials. CBS v. F.C.C., 7 Media Law Reporter 1563 (1981). On the matter of common carrier status, Sec. 3(h) of the Communications Act states that "a person engaged in radio broadcasting shall not, insofar as such a person is so engaged, be deemed a common carrier."

16. CBS v. Democratic National Committee, 412 U.S. 94, 125 (1973).

17. Ibid., 126.

18. National Conservative Political Action Committee (NCPAC), 89 F.C.C. 2d 626, 628, n. 4 (1982).

19. You Can't Afford Dodd Committee, 81 F.C.C. 2d 579 (1980).

20. Carter/Mondale. Reelection Committee, Inc., 81 F.C.C. 2d 409 (1980).

21. "Court Voids Limit On PAC's Spending," New York Times, March 19, 1985, p. 1, 14.

22. Carter/Mondale Reelection Committee, 416.

23. Honorable Thomas F. Eagleton, 81 F.C.C. 2d 423, 424 (1980).

24. Ibid., 427-428.

25. J. Curtis Herge, Esq. (NCPAC), 88 F.C.C. 2d 626, 627 (1981).

26. Ibid., 629.

27. Republican National Committee, 25 F.C.C. 2d 739 (1970).

28. Ibid., 743.

29. Democratic National Committee, 91 F.C.C. 2d 373, 377, n. 8 (!982).

30. Ibid., 384.

31. Democratic National Committee, 91 F.C.C. 2d 1171 (1983).

32. First Report, 48.

33. CBS et al. Petition for a Declaratory Ruling, filed July 30, 1982.

34. Ibid., 12.

35. Defined in 11 C.F.R. Sec. 100.5(f)(2).

36. People for the American Way Comments on CBS et al. Petition, 7.

37. In re Request of CBS et al. for a Declaratory Ruling, 95 F.C.C. 2d 1152, 1164 (1983).

38. Ibid., 1165.

39. "Negative Campaign Spending Triples," USA Today, March 23, 1983, p. 4.

40. "Riding the PAC Wave," San Antonio Light," March 17, 1985, p. 22.

41. In a typical year, fewer than one per cent of fairness complaints are even sent on to licensees for responses, and of these, 15 per cent result in rulings against the licensee. Interview with Milton Gross, Chief, FCC Fairness/Political Branch, Nov. 20, 1982.

42. Democratic National Committee v. FCC, 717 F 2d 1471 (1983).

43. Comment at panel discussion, as reported in Proceedings of the Symposium on Media Concentration, Vol. II, sponsored by the Federal Trade Commission's Bureau of Competition, p. 193.